ORIGINAL

EX PARTE OR LATE FILED

WILLKIE FARR & GALLAGHER

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

202 328 8000
Fax: 202 887 8979

August 17, 2001

VIA HAND DELIVERY

RECEIVED

AUG 17 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals, Room TW-B204
445 Twelfth St., S.W.
Washington, D.C. 20554

Re: *Verizon Application for Authorization Under Section 271 of the Communications Act to Provide In-region, InterLATA Service in the State of Pennsylvania*, CC Dkt. No. 01-138

Dear Ms. Salas:

On August 16, 2001, Richard Juhnke of Sprint Communications Company L.P. and the undersigned met with Jordan Goldstein, Legal Advisor in the Office of Commissioner Copps. We provided Mr. Goldstein with updated information regarding Verizon's response to the issues raised in Sprint's comments, as set forth in the attached summary. We also discussed the need for the Commission to act in Section 271 applications where issues of federal law are implicated. As part of that discussion, we provided Mr. Goldstein a copy of the Administrative Law Judge's Recommended Decision in the Sprint/Verizon arbitration proceeding in Pennsylvania. We also discussed Verizon's position that it be paid access charges for local calls that transit 00- interconnection trunks. In addition to raising this issue as a checklist item (number 13), Sprint indicated that the Commission could also consider it as part of Section 271's public interest inquiry. Finally, Sprint urged the Commission to examine broadly the state of competition in Pennsylvania, including the pattern of misconduct on Verizon's part, as demonstrated by Sprint and other commenters. In accordance with the Commission's rules, an original and one copy of this filing, as well as the materials provided to Mr. Goldstein, are being submitted.

Best regards,

A. Renée Callahan

A. Renée Callahan

cc: (without attachments)
Jordan Goldstein

(with attachments)
Susan Pié
Ann Berkowitz
James J. McNulty
Kelly Trainor

No. of Copies rec'd 0+1
List ABCDE

Verizon Pennsylvania Section 271 Proceeding, CC Dkt. No. 01-138

Key Issues Raised by Sprint:

1. *Actual Point Of Termination (APOT)* (checklist items 1, 2, 5)

   - Verizon's refusal to allow CLECs to order UNE transport at the same time as collocation space has resulted in Sprint experiencing additional delays of up to *120 calendar days* in obtaining transport after the collocation arrangement is otherwise complete. Once this delay is added to the 130 calendar days that it takes to provision the cage itself, it can take up to eight months to obtain access to functional collocation.

   - In its reply, Verizon ignores Sprint's complaint and instead responds to a similar -- but different -- argument regarding access to dark fiber raised by Cavalier below. Verizon Reply at 30. Specifically, Verizon claims that it has undertaken a trial that it anticipates "in the near future . . . will enable Cavalier (and other CLECs) to request collocation and dark fiber contemporaneously." Id. Although it is Sprint's understanding that a trial began last week in Maryland, there is no required conclusion date nor any requirement that Verizon implement any change in process arising from that trial. Moreover, even if the problem is (manually) fixed for dark fiber, as requested by Cavalier, there is no requirement that Verizon implement the same fix for interoffice transport.

2. *00-Minus/Reciprocal Compensation* (checklist item 13)

   - Sprint seeks to offer innovative services available through its operator services platform whereby a Sprint long distance customer can dial "00 minus" to complete a local call that terminates in the same calling area. Verizon, however, insists on treating *any and all* calls directed through an IXC operator services platform as *access* traffic and not as local traffic.

   - In its reply, Verizon states (correctly) that this issue is before the state PUC and claims (incorrectly) that the state proceeding is the appropriate forum for resolution of Sprint's claims. Verizon Reply at 34 n.29. Contrary to Verizon's claims, because this issue is governed by federal law, the Commission is obligated to render its own explication of the statute.

3. *GRIPS* (checklist item 1)

   - Under GRIPS, Verizon requires the CLEC to either collocate multiple times in a LATA or to pay for all transport costs beyond Verizon's end office for traffic originated by both the CLEC and by Verizon, thus effectively denying CLECs the right to interconnect at a single point per LATA. In contrast to other applications, there is no interconnection agreement available under 252(i) in Pennsylvania that allows, in Verizon's own words "the CLEC to designate a single interconnection point per LATA." Sprint Brief at 7 (citing Verizon Response to In-Hearing Data Request No. 64).

4. *Collocation Power Charges* (checklist item 1)

   - Verizon's current state collocation tariff authorizes it to double charge CLECs for power. Although Verizon has submitted revisions to its tariff that were to become effective in May 2001, they have since been suspended by the PUC for a period not to exceed six months, or until November 20, 2001.

5. *Verizon's Demand for Reciprocal Collocation Rights* (checklist item 1)

   - Verizon concedes that it has "requested in an ongoing arbitration the ability to collocate at Sprint's switch centers in order to meet its obligation to interconnect with Sprint, [but that] it has never taken the position that the 1996 imposes collocation duties on Sprint." Verizon Reply at 19 n.13. Far from making Verizon's position seem more reasonable, Verizon's demand for rights during a Section 251-252 arbitration to which it is expressly not entitled under the Act is simply another example of Verizon's "take-no-prisoners" negotiation style.

<u>Key Issues Raised by Other Commenters, including DOJ</u>:

1. Verizon fails to provide accurate and auditable electronic bills.

2. The Pennsylvania PAP contains insufficient financial penalties with regard to the level of those penalties and their correlation with poor performance.

3. UNE pricing is not TELRIC.

4. Verizon fails to provide nondiscriminatory access to high capacity (in particular DS1) loops, as evidenced by its rejection of CLEC orders due to "no facilities."

5. Verizon's xDSL resale commitment is insufficient and should be expanded to include any CLEC wishing to resell xDSL, whether that CLEC serves the end user via resale, UNE-loop or the UNE-platform.

6. Verizon fails to notify CLECs of lines lost to competitors, resulting in double billing. *WorldCom alone* reports that this failure affects some 8,000 customers per month, or 96,000 customers annually (roughly 10% of all lines captured by CLECs).

Washtech.com

RECEIVED

AUG 17 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Rhythms to Cut Off Its DSL Subscribers

Friday, August 10, 2001
By Cynthia L. Webb,
Washington Post Staff Writer

Rhythms NetConnections Inc., one of the few remaining independent digital subscriber line carriers, told its customers that their high-speed Internet connections will be turned off in 31 days.

The Englewood, Colo.-based company and its subsidiaries filed for Chapter 11 bankruptcy protection Aug. 2 and said yesterday that it notified customers on Thursday of the shutdown. It also laid off 75 percent of its staff—about 700 employees.

Messages left with Rhythms officials were not returned yesterday, leaving it unclear how many customers in the Baltimore and Washington region would lose their DSL service, which provides a fast Internet connection over regular telephone lines.

As of March 31, Rhythms had 83,000 digital subscriber lines, with about 40 percent reaching individual customers and the rest businesses. Other companies provide the connections to end-users.

It's been an awful year for independent providers of DSL service. Earlier this week, Santa Clara, Calif-based Covad Communications Group Inc. said it was negotiating with bondholders to eliminate $1.4 billion in debt through a Chapter 11 bankruptcy filing by its parent company, planned this month.

In March, San Francisco's NorthPoint Communications Group Inc. shut down.

Mike Lauricella, an analyst at the Yankee Group, said the fall of Covad, NorthPoint and Rhythms might soon mean higher prices for DSL users, with the big regional phone companies left to dominate the market.

"It's good news for the Verizons of the world, but it's kind of the way for the monolithic telcos to teach a lesson that if you compete with us, sooner or later you are going to die. So enter at your own risk," Lauricella said.

Herndon-based Savvis Communications Corp. has about 250 customers on Rhythms-provided DSL, Chief Financial Officer David Frear said. The company is offering to switch them to slightly more expensive dedicated connections.

DirecTV Broadband of Cupertino, Calif., is another Rhythms partner. It plans to transfer the unspecified number of its 68,000 customers on Rhythms DSL to one of its four other DSL carriers, spokesman Bill Chandler said.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Sprint Communications Company, L.P. for an Arbitration Award of Interconnection Rates, Terms and Conditions Pursuant to 47 U.S.C. §252(b) and Related Arrangements With Verizon Pennsylvania Inc.	:	Docket No. A-310183F0002

RECEIVED
AUG 17 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RECOMMENDED DECISION

Before
MARLANE R. CHESTNUT
Administrative Law Judge

I. HISTORY OF THE PROCEEDING

On May 15, 2001, Sprint Communications Company, L.P. (Sprint) filed with the Pennsylvania Public Utility Commission (Commission) a Petition requesting arbitration of interconnection agreements with Verizon Pennsylvania, Inc. and Verizon North, Inc. (collectively, Verizon). The Petition, which listed approximately 28 unresolved issues, was filed pursuant to §252(b) of the Telecommunications Act of 1996, 47 U.S.C. §252 et seq. (TCA of 1996), and Commission Orders entered June 3, 1996 and September 9, 1996 at Docket No. M-00960799, Implementation of the Telecommunications Act of 1996.

By Hearing Notice dated May 23, 2001, a pre-arbitration conference was scheduled for June 8, 2001 and the matter was assigned to me. I issued Prehearing Orders #1 and #2 on May 23, 2001 and June 12, 2001, respectively.

On June 11, 2001, Verizon filed an Answer to the Petition. This Petition listed an additional 16 issues.

Pursuant to the schedule adopted at the pre-arbitration conference, both parties submitted initial offers on July 5, 2001. An arbitration conference was held on July 11-12, 2001, in Philadelphia. Both parties presented witnesses. Admitted into the record were various exhibits. On July 20, 2001, both parties submitted their final offers. Accompanying Sprint's final offer were additional exhibits; these exhibits will be admitted into the record. In response to my request at the arbitration conference, Verizon supplied the response to Sprint Exhibit 4, and an affidavit which purports to respond to Sprint Exhibit 12. These exhibits also will be admitted into the record. Appendix A lists the witnesses and exhibits.

TABLE OF CONTENTS

While both parties agreed that many of the issues and sub-issues contained in their respective final offers had been resolved in principal (and would be addressed by the filing of a Joint Stipulation of Resolved Arbitration Issues on July 31, 2001), numerous issues and sub-issues remained outstanding. These issues are addressed below. The Stipulation was filed on August 3, 2001. Also on August 3, 2001, Verizon submitted new proposals on several issues. Sprint objected to my consideration of these new proposals, for several reasons.

Finally, it should be noted that the FCC's Bell Atlantic/GTE Merger Order at 46-47 requires that Verizon (formerly Bell Atlantic/GTE) make out-of-region interconnection agreements (ICAs) available that an ILEC (not Verizon) develops for a Verizon affiliate, at the request of that affiliate, where it operates as a new local telecommunications carrier. The FCC also required that Verizon make available any in-region, voluntarily negotiated post-merger ICAs to which Verizon is a party.[1] The effect of these conditions is that if Verizon does not enter into voluntarily negotiated ICAs, it avoids the possibility that another carrier can MFN that agreement. Conversely, arbitrated ICAs or terms are not available for MFN adoption by another carrier in its interconnection agreement with Verizon. This MFN concern was expressed a number of times by Verizon.[2]

Because of the extremely short time period allowed for preparation of this Recommended Decision, my discussion is necessarily abbreviated. This should not be taken as evidence that any position or argument presented by either of the parties was not fully considered.

---

1 GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum and Order, FCC 00-221, June 16, 2000 (Bell Atlantic/GTE Merger Order).

2 See, Tr. 156, 167, 208.

II. DISCUSSION

Issue #1: Terms and Conditions

This issue involves the transport and termination rates and charges that Verizon must pay for access to Sprint's facilities in order to interconnect. Sprint's position is that it should be permitted to charge the rates and charges established in its tariff, even when such rates are higher than those charged by Verizon for the same or similar services. Verizon's position is that an incumbent's rates are presumptively just and reasonable and should be used, unless the CLEC submits an appropriate cost of service study, which Sprint has not done.

Sprint's position is reasonable and should be adopted. First, there is no question that as a matter of law it is obligated by Section 1303 of the Public Utility Code, 66 Pa.C.S.A. §1303, to charge its tariffed rates for service, not the rates and charges contained in Verizon's tariff. Second, each and every authority cited by Verizon as support for its position recognizes that the CLEC can, if it does not wish to adopt Verizon's rates and charges, charge rates that are either negotiated or supported by a cost study. These authorities include the Federal Communication Commission's (FCC) Local Competition Order, a Massachusetts D.T.E. arbitration order and the Commission's Global Order. See, respectively, Implementation of the Local Competition Provisions in the Telecommunications Act of 1966, FCC Docket No. 96-98, First Report and Order, ¶1085, 11 FCC Rec. 15499 (1966); In re Petition of Sprint Communications Company L.P. pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of an interconnection agreement between Sprint and Verizon – Massachusetts, MA D.T.E. Docket No. 00-54 at 21-22; and Joint Petition of Nextlink Pennsylvania, et al. for Adoption of Partial Settlement, Docket Nos. P-00991648 and P-00991649, Commission Opinion and Order entered August 26, 1999, Appendix D, §§53.59(a) and (c).

Use of an incumbent's rates for transport and termination has been accepted by the various regulatory bodies as a proxy, not necessarily a cap. A CLEC can choose to adopt an ILEC's rates, which are presumptively reasonable, so as to avoid the necessity of presenting an appropriate cost study. However, this is a rebuttable presumption – an ILEC clearly has the right to charge higher rates if they are cost-justified or negotiated. Of course, any proposed or existing tariff is subject to challenge. If an ILEC in that situation is unable to support its higher rates, then presumably it will not be permitted to included them in its tariff.

Issue #3: Resale of Vertical Features

This issue here is whether Sprint should be permitted to purchase vertical features at a wholesale rate for resale. Verizon's position is that Sprint may purchase vertical features (custom calling features such as various call forwarding options) for resale at the retail – not wholesale – price, because Verizon does not offer such services on a stand-alone basis (i.e., without dial-tone) to its own customers.

Sprint witness Burt[3] explained that Sprint intends to provide a suite of services called "Unified Communications" which is designed to "provide consumers with the ability to take messages from a voice device, whether it be a wire line telephone, wireless telephone, a pager, e-mails, getting access to the internet, and really combining all of those services so that you can access any one of them from any one of the others, if that makes sense." Tr. 233.

Sprint's position should be accepted with respect to this issue.

---

[3] James R. Burt is employed by Sprint Communications as Director of Regulatory Policy.

Section 251(c)(4) of the TCA provides in relevant part that each ILEC has the duty:

> (A) To offer for resale at wholesale prices any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers; and
>
> (B) Not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service . . .

This aversion to resale restrictions was recognized by the FCC, which has concluded that resale restrictions are "presumptively unreasonable." Local Competition Order, ¶939. See also ¶871 of that Order, where the FCC found "no statutory basis for limiting the resale duty to basic telephone service."

Verizon's position is that it has no legal obligation to sell discounted vertical services to Sprint because it does not offer these services at retail on a stand-alone basis. I disagree.

As convincingly explained by Sprint in its Petition for Arbitration, Initial Offer and Final Offer, local dial tone and vertical features are effectively two separate retail offerings. They are tariffed separately, priced separately, provisioned separately and billed separately. Vertical services are telecommunications services which are sold to end-users, thus making them a retail service subject to §251(c)(4).

It cannot be disputed that there is no technical impediment to the resale of vertical features on a stand-alone basis. See, Tr. 237, where Verizon witness Muller[4] admitted that Verizon's refusal was based purely on its legal position, not on operational

[4] Marlene Muller is employed by Verizon Maryland as a Senior Specialist.

or technical concerns. In fact, Verizon offers these services to its wireless customers, as well as to Enhanced Service Providers (ESPs), although not at a discount. As stated by Sprint in its Initial Offer at 12, "However, simply because Verizon does not offers a discount to certain end users (as in the case of ESPs) does not alter the essential nature of these services as separate retail services and does not alter Verizon's statutory resale obligation."

In its Final Offer at 10, Verizon states "That other ILECs allegedly do what Sprint requests misses the mark. No evidence was presented by Sprint at the arbitration conference which would suggest that other ILECs have the same tariff as Verizon. Put another way, other ILECs may in fact offer vertical features to Sprint at a discount precisely because they *do* offer vertical features on a stand-alone basis in their respective tariffs – a dispositive fact under controlling law that does not exist here."

This argument itself misses the mark. A utility's tariff cannot itself frustrate statutory rights and obligations. To accept Verizon's argument would be to elevate form over substance. First, regardless of the tariff, it is clear that dial tone and vertical services are in fact two separate offerings, as discussed above. Second, to allow Verizon to arbitrarily – for reasons that are not technical or operational – bundle services with dial tone so as to avoid the resale obligations associated with those services would be in derogation of the efforts of Congress, the FCC and this Commission to encourage local telephone competition.

Verizon has failed to rebut the presumption that this resale restriction is unreasonable. The position it has taken clearly results in unnecessary impediments to local telephone competition in Pennsylvania. Verizon is considering the offering of a single-number feature, whereby a single universal number unites various communications devices (business and home telephones, cellular telephones and pagers) so that when the single number is called, up to three other numbers will ring simultaneously.[5] Sprint should be able to offer the same type of service.

Finally, Verizon points out that it has not conducted a cost study for discounting vertical features. Therefore, Sprint's compromise position, explained in its Final Offer at 14, should be accepted. Verizon should make these vertical services available for resale to Sprint on a stand-alone basis (without dial tone) on an interim basis at the full wholesale discount until such time as Verizon files the appropriate cost studies that establish that a recalculation of the wholesale discount rate is justified and appropriate. Also, the billing options available to ESPs, expressed at page 14 of Sprint's Final Offer, should be made available to Sprint as well.

Issue #5: Loop Qualification Database

The issue here is whether Sprint should be required to use Verizon's database for loop qualification as part of the pre-ordering process for ordering DSL loops.

Verizon's position is that Sprint should be forced to utilize Verizon's database for pre-ordering loop qualification, which was developed in consultation with other CLECs in a New York collaborative. It points out that it makes sense to have all CLECs utilize this database, for which rates have been approved by the Commission, and that there are problems associated with Sprint's Sapphyre system.

Sprint modified its initial position (that it be permitted to utilize either Verizon's loop qualification database or its own system for prequalifying loops) to instead suggest that it utilize Verizon's system for the first six months of the term of the ICA (paying the applicable charges), and thereafter choose which system to use.

---

5 Sprint Exhibit 1, Initial Offer, Verizon's response to Sprint 1-6.

As discussed in more detail below, Sprint's proposal should be adopted.

In its Final offer, Verizon advances three reasons why Sprint should be forced to utilize Verizon's database. First, it asserts that the Sapphyre and GSAM systems utilized by Sprint are inaccurate. It states that "Sprint's witness admitted on the record that neither the Sapphyre nor the GSAM loop qualification databases that Sprint wants to use are 'flawless.'" Frankly, I am surprised that Verizon made this statement, which is clearly taken out of context. Sprint witness Nelson[6] actually pointed out at Tr. 138 that both companies' prequalification systems are not flawless: "Is our system flawless, no. Is Verizon's database system flawless, no. Neither one of them are perfect." In fact, to her credit, Verizon's own witness Clayton[7] agreed at Tr. 138-39: "I would agree. Our systems are not flawless . . ."

Although in its Final Offer Verizon describes the deficiencies associated with the Sapphyre system, Ms. Clayton admitted that she had reviewed the system well over a year ago. Sprint witness Nelson explained at Tr. 133 that it is a different system than that she examined: "[Ms. Clayton] had identified Sapphyre as it existed a year or so ago. They way we refer to Sapphyre, we actually have a diskette we can send an end user, plug into their modem, it's an online test. That's the Sapphyre we talked about today. The moniker is the same. I think it has changed as far as the system. So this is actual loop qualification that is performed, giving feedback and then we can determine whether DSL would work in that line or not." In fact, Ms. Clayton expressly admitted

6 Mike Nelson is employed by Sprint as Director of Local Market Development.

7 Rose Clayton is employed by Verizon as Product Manager of DSL and Line Sharing.

that Verizon had made no attempt to examine the accuracy or appropriateness of Sprint's systems. Tr. 122-23.

Thus, Verizon's statement about the alleged deficiencies of the Sapphyre system contained in its Final Offer at 16-17 must be completely disregarded. Further, its footnote 18 at page 16, in which it disclaims any knowledge whatsoever about the GSAM system (other than an internet reference to weapons and the weather system satellite that serves southeastern Australia) is intentionally misleading in light of its own witness Clayton's description at Tr. 123 of the GSAM system as ". . . more of a geometric qualification tool, almost like a triangulation qualifications tool. I am less familiar with that method of prequalifying loops."

I am surprised that Verizon, before completely rejecting use of Sprint's proposed loop qualifying system, did not even attempt to find out about the system or its accuracy as part of its negotiations. Clearly, having each loop checked on-line – rather than having to have recourse to either Verizon's mechanized database or a manual examination of the engineering plants contained in a particular central office – is a reasonable way of determining whether that particular loop is suitable for DSL service.

Verizon's second objection, that acceptance of Sprint's position would "create new problems and impose new costs," is similarly without merit. I just don't believe that it would be necessary to "cull out all Sprint orders by hand . . ." (Final Offer at 19) in order to allow a CLEC to use its own qualifying system in the pre-ordering stage. Since other CLECs have requested to use Sapphyre (Tr. 123), it may be that Verizon should address this anyway, in order to make its system more acceptable to the CLECs generally. On the other hand, if there is a reasonable cost which can be attributed to the measures necessary to accommodate Sprint, then it may be reasonable to have Sprint bear those costs. Of course, this could have been addressed as a negotiated contract term.

This is not to minimize Verizon's valid concerns. I again repeat my belief that a uniform system that is designed to address the concerns of all CLECs (so that CLECs are not put in the position of having to obtain their own systems) – is preferable. Sprint feels that its system is better and more efficient – that may well be true, perhaps other CLECs feel that way as well. Perhaps the system which arose from the collaborative process should have incorporated from the beginning a process to deal with the situation where a CLEC does not choose to use Verizon's qualification database.

Clearly, both parties fundamentally should want the same result – a reasonable system for provisioning DSL loops. As pointed out by Sprint in its Final Offer (p. 15) and elsewhere, "Sprint has just as much incentive as Verizon to ensure that its loop qualification systems are accurate . . ."

Both parties agree that if a CLEC assumes the responsibility for pre-ordering loop qualification, then the performance metrics relating to those issues should be waived. I agree. This is done elsewhere, as explained by Sprint witness Nelson at Tr. 142: "That is exactly what has happened, we have a Sprint Las Vegas local telephone company and that's exactly what the resolution we resolved out there with the CLEC, if we do not use, if the CLEC did not use the ILEC prequalification system, then those loops were outside of the performance measurement."

As to Verizon 's concerns with other CLECs opting in, if their qualification systems are accurate, then this should not be a problem.

Verizon's third and final point is that its rates have been approved by the Commission in its Interim Opinion and Order, Further Pricing of Verizon Pennsylvania, Inc.'s Unbundled Network Elements et al., Docket No. R-00005262 (June 8, 2001). Of course, the Commission has not accepted that these rates are cost justified.

For loops for which DSL is ordered, Verizon charges a mechanized qualification database charge of $.44 per loop, monthly, for the life of the loop. Sprint witness Nelson described this effect at Tr. 135:

> Part of it is, if their loop qualifications database, they were charging me two cents a month or 10 cents a query, maybe we might have a different attitude about it. Right now in Pennsylvania it's 45 cents a month, times hundreds of loops, and hundreds of months, ends up being a lot of money. And in some states like Massachusetts there is no charge for that. We have states like Maryland, where it's 45 cents a query and 45 cents times the life of a customer . . . Another point, there are many ILECs that have loop qualifications systems but do not make their use mandatory. Our own local telephone company within Sprint has a system, it's not mandatory. GTE has a system, but it's not mandatory.

Yet, it is clear that it is not simply a desire to avoid these costs that is the basis for Sprint's position. Mr. Nelson later made it clear that Sprint wants to avoid an unnecessary process (having to access Verizon's database) and that it has more confidence in its own prequalification systems. Tr. 139. Obviously, unsatisfied with Verizon's efforts, Sprint went ahead and deployed its own testing network

In summary, it is clearly anti-competitive to force CLECs to utilize a prequalification process they neither need nor want, and to incur substantial costs as well. Sprint has modified its initial offer, so that for the first six months of the contract it will only use Verizon's loop pre-qualification process (and pay the appropriate fees) and thereafter will have the option of using its own loop pre-qualification system. This is reasonable, as it will give Verizon an opportunity to make whatever changes are necessary to its system.

Issue #8: Packet Switching

Sprint has considerably modified its original request, which was addressed to packet switching at both central offices and remote terminals. Now, as set out in its Final Offer, Sprint is suggesting that packet switching at the remote terminal be addressed in either a separate proceeding or in the on-going Commission workshop, <u>Collaborative to Address the Design and Deployment of Fiber and Next Generation Digital Loop Carrier and Equal Access to Digital Subscriber Lines over Fiber</u> at Docket No. M-00001353, and that Verizon/VADI be required to unbundle packet switching at the central office only, with the parties being given a limited period of time to negotiate terms and conditions. Verizon has refused, based on the following: (1) packet switching does not currently exist as a network element in either Verizon PA or Verizon North's network. VADI (Verizon Advanced Data, Inc.) is the only Verizon entity with the authority to own and operate advanced services equipment (such as packet switches); (2) Sprint has not shown that the FCC's four-part test applicable to the unbundling of packet switching has been met; (3) Sprint has failed to establish its right pursuant to an "impair" analysis, which in any case is inappropriate; and (4) technical problems with Sprint's ION service offering undermine its assertions that it has a present need to access packet switching.

Sprint's compromise proposal, that the issue of packet switching at remote terminals be deferred and that the issue of unbundled packet switching at central offices be the subject of further negotiations between itself and Verizon and/or VADI (its affiliate), should be accepted.

The threshold issue to be addressed concerns the status of VADI. I agree with Sprint that VADI's ownership of the packet switching assets and its status as a separate corporate entity is not determinative for arriving at an interconnection agreement in this case.

First, the Ascent decision[8] cited by both parties makes it clear that Verizon cannot avoid its statutory obligations by relying on VADI's separate corporate status. The Court there stated at 2001 U.S. App. LEXIS 217, *17: ". . . to allow an ILEC to sidestep §251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme" and further, at *18, ". . . the [FCC] may not permit an ILEC to avoid §251(c) obligations as applied to advanced services by setting up a wholly-owned affiliate to offer those services."

This is in accord with the Commission's statement, cited in Sprint's Initial Offer at 29, in the Structural Separations Order entered May 24, 2001 at Docket No. M-00001353, that: "Moreover, as expressed in Ordering Paragraph No. 8, we expect that Verizon shall adhere to its Section 251 obligations notwithstanding the creation of any other affiliates, as those obligations are interpreted by the FCC and the courts." Order on Reconsideration at 23.

Second, VADI is not an ILEC. It is a CLEC (or DLEC) and a reseller. Therefore it has no obligation to negotiate or enter into an interconnection agreement with Sprint or any other CLEC.

To require Sprint to negotiate separately with VADI would result in it being forced to conduct two separate negotiations with Verizon affiliates to achieve "the benefits of competition envisioned under the Act in Verizon's territory." Sprint Initial Offer at 28-29. This clearly is anti-competitive, and hardly what the Commission

---

8 Association of Communication Enterprises v. FCC, 235 F.3rd 662 (D.C. Cir. 2001), 2001 U.S. App. LEXIS 217.

intended by ordering the functional separation of Verizon's wholesale and retail operations.

Third, it should be noted that Verizon recently requested that the FCC expedite the sunset of the merger condition giving rise to VADI.[9] Sprint Exhibit 6, Initial Offer. As of the arbitration conference July 11 and 12, 2001, the FCC had not acted upon that request. Tr. 252. Upon approval by the Commission, Verizon could fold VADI back into its ILEC operations. Verizon counsel Conover stated that no decision has been made concerning that. Tr. 251.

Finally, Verizon apparently recognizes its obligation, as its proposed contract language states that "Verizon shall make available to Sprint the Packet Switching Capability network element . . ." Section 1.4(b).

The next issue is what standard should be applied in determining whether central office packet switching should be required to be provided as an unbundled network element. Verizon's position is that the FCC has already concluded (in its 1999 UNE Remand Order[10]) that it need not be provided, unless the four-prong test contained at 47 C.F.R. §51.319(c)(3)(B) is satisfied. It also asserts that even if an "impair" analysis is undertaken, Sprint has failed to establish that it is entitled to packet switching as an unbundled element.

---

9 By the terms of the Bell Atlantic/GTE Merger, the FCC's Order provided that the requirement to maintain the affiliate (VADI) would sunset nine months after a final and non-appealable order determining that it is a successor or assign of the ILEC. Both parties agreed this was triggered by the Ascent decision. Tr. 253.

10 In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1966, Third Report and Order and Fourth Further Notice of proposed Rulemaking, 15 C.F.R. 3696 (1999).

Sprint asserts that the four-pronged test applies only to packet switching at remote terminals, and that pursuant to a Rule 51.317 analysis[11] it has shown that it would be materially impaired unless the Commission orders Verizon to unbundle packet switching where it is deployed.

I do agree with Sprint that the FCC's four-pronged test must be read in conjunction with the whole of the UNE Remand Order. The FCC there (at ¶312) expressly recognized that a CLEC has the opportunity to prove to a state Commission that a lack of access to packet switching impairs its ability to offer advanced services.

It is correct that the FCC in its 1999 UNE Remand Order expressly declined to order packet switching unbundled, except in a limited circumstance. While it found that CLECs are not impaired in their ability to serve high-volume customers, it found that they are impaired in their ability to serve small-volume users by reason of the cost and delays associated with collocation. ¶306. However, citing the "nascent nature of the advanced services marketplace," the FCC refused to order "unbundling of the packet switching functionality as a general matter." Id. It went on to explain in more detail at ¶¶316 and 317:

> Despite the encouraging signs of investment in facilities used to provide advanced services described above, we are mindful that regulatory action should not alter the unsuccessful deployment of advanced services that has occurred to date. Our decision to decline to unbundle packet switching therefore reflects our concern that we not stifle burgeoning competition in the advanced service market. We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation.

---

11 47 C.F.R. §51.317(b)(4).

> Our overriding objective, consistent with the congressional directive in Section 706, is to ensure that advanced services are deployed on a timely basis to all Americans so that consumers across America have the full benefits of the "Information Age." The advanced services marketplace is a nascent one. Although some investment has occurred to date, much more investment in the future is necessary in order to ensure that all Americans will have access to these services. We remain concerned about the lack of deployment in rural areas. We note that we will carefully monitor the deployment of broadband services to ensure that the objectives of Section 706 and the Act are being met. We decline to unbundle packet switching at this time, except for the limited exception described above.

Obviously, a considerable amount of time (especially in the context of advanced services) has elapsed since the FCC's decision. In fact, the FCC has reopened its examination of the packet-switching issue (including remote packet switching).[12] As there is no indication when, if ever, the FCC will issue its findings, it is not possible in this arbitration to defer to that agency.

The FCC refused to direct that packet switching be unbundled because it did not wish to "stifle competition." The question here is whether this continued refusal will actually work to stifle competition by requiring CLECs to collocate in every central office where they wish to offer advanced services.

Sprint has established that it is indeed impaired as found by the FCC, due to the costs and delay of collocation. Its uncontroverted testimony was that although it was collocating in almost a hundred central offices in order to provide its ION service, there are markets (such as portions of Philadelphia and Pittsburgh, as well as Scranton and Harrisburg) which lack the density to make collocation economically justified. Tr. 273-

---

12 Sprint filed comments in January or February 2001. Tr. 355.

75. Obviously, then, residents in those areas will not be able to avail themselves of the innovative advanced services proposed by Sprint. It would be ironic if residents of Pennsylvania – a state which has been nationally recognized as being in the forefront of utility deregulation – would be unable to enjoy the benefits of competition.

I do have some questions how unbundling would be implemented, however. There is no question that Verizon – through assets owned by VADI – does have packet switching functionality at its central offices, as do other CLECs who have collocated DSLAMs in central offices. My understanding is that at the present time, there are no multihosting or shared DSLAMs available, so that Verizon, to provide unbundled packet switching to accommodate Sprint, would have to dedicate a DSLAM to Sprint. If this is the case, then it may well be that unbundling is premature and should not be required at this time.

This, however, was not addressed by Verizon, presumably because of its insistence that it does not own, operate or control packet switching functionality or equipment at its central offices. As a result, the record is devoid of any testimony that there would be difficulty in implementing an ICA which contains the language proposed by Sprint. While I am concerned that the unbundling may not be as simple as it appears, I will take Sprint at its word that it is not requiring Verizon (or VADI) to purchase or deploy new facilities. As stated by Sprint in its Final Offer at 24-25 (footnotes omitted): "To again make clear, Sprint is not seeking that Verizon/VADI deploy new facilities. Sprint does not deny that packet switching (i.e., PARTS) has not been deployed at Verizon's remote terminals. Relative to the central offices, however, the record demonstrates that DSLAM functionality exists today and is presently being employed for the provisioning of advanced services from Verizon's own central offices. We are requesting that Verizon be required to allow Sprint to use the "full features, functionalities and capabilities of that equipment."

I must restate my disappointment that the parties were unable to resolve this issue. For example, Verizon could have agreed that it would provide packet switching functionality at certain identified, limited central offices pursuant to a mutually acceptable schedule, instead of refusing to make any accommodation to Sprint while reserving its legal position.

In conclusion, I am recommending that the Commission adopt Sprint's proposal concerning packet switching at the central offices, and declare that Verizon is required to provide central office packet switching functionality. The parties' positions actually are in agreement after this point – that if the Commission determines that packet switching is a UNE, then the parties agree to negotiate in good faith the rates, terms and conditions (Verizon Final Offer, proposed Part II, Section 1.4(b)). Therefore, I further recommend that a 45-day period be provided for the parties to meet and discuss the technical and operational details of accomplishing unbundling, as well as the rates, terms and conditions. If they are unable to do so, then they can jointly petition the Commission (using the Abbreviated Dispute Resolution Process) for resolution of any outstanding issues. In addition, I recommend that Sprint file a petition with the Commission requesting that the issue of packet switching at remote terminals be addressed either in the pending proceeding at Docket No. M-00001353 or in a separate proceeding (either a collaborative or an investigation).

Issue #12: Definition of Local Traffic

This issue involves the definition of local traffic and telecommunications traffic for purposes of reciprocal compensation. It arose as the result of the ISP Remand Order issued by the FCC on April 27, 2001 and the regulations adopted at 47 C.F.R.

51.701.[13] Both parties agree that the definition of "telecommunications traffic" (which replaces the term "local traffic") should reflect the definition contained in the regulation. Both, however, go beyond this and include other terms, which are not defined.

Sprint's proposal contains a definition of the term "local traffic" which is nowhere defined in the Telecommunications Act or any FCC regulation. Verizon's proposal contains and defines the term "reciprocal compensation traffic," also a term which does not appear in the Act or any regulation. What Rule 701 does is define the terms "telecommunications traffic," "transport," "termination" and "reciprocal compensation arrangement."

It is important not to take the ISP Remand Order (and the regulation which arose from it) out of context. The FCC there was not addressing the issue of defining local traffic generally for reciprocal compensation purposes. Instead, it was reconsidering the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs) only. In fact, it specifically mentioned that it was opening a separate proceeding to examine intercarrier compensation schemes generally.[14]

In order to be consistent with my recommended resolution of Issues 16 and 17, infra, Sprint's proposal should be adopted.

---

13 In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1966, Inter-carrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, CC Docket Nos. 96-99-68m §34 (ISP Remand Order).

14 Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. April 27, 2001).